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In The

Supreme Court of the United States

October Term, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUAL LUJAN, JR., SECRETARY OF THE INTERIOR,

Petitioners,

vs.

SEATTLE AUDUBON SOCIETY, *ET AL.*,

Respondents.

On *Writ Of Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE OREGON LANDS COALITION AND THE WASHINGTON LANDS COALITION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION, THE OREGON LANDS COALITION AND THE WASHINGTON LANDS COALITION

Mountain States Legal Foundation (MSLF) respectfully petitions to file the annexed brief *amici curiae* pursuant to Supreme Court Rule 37. The Solicitor General of the United States has given his consent to this *amici* brief. Defendants-Intervenors below have also given consent to MSLF for the filing of an *amici* brief. However, Respondents have denied consent.

IDENTITIES AND INTERESTS OF AMICI

Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation organized pursuant to the laws of the State of Colorado and dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government, and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state in the country. Large numbers of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in so-called environmental issues. In addition, MSLF is active on behalf of its members and the public interest in seeking an equitable balance between economic and environmental objectives in the management of the forests of the Pacific Northwest.

The interests of Petitioners and Respondents are with the impact of the decision below on each of them individually. MSLF believes that there are broader public policy concerns which will not be addressed adequately if the arguments set forth herein are not heard by this Honorable Court. It is not just a question of economics in the narrow sense or the meaning of the statute that is at issue in the instant case, but the impact of any decision on the lives of thousands, if not tens of thousands of men, women and children of the Pacific Northwest.

MSLF has participated in numerous cases before this Honorable Court as an *amicus* or as attorney for one of the parties or as an intervenor, most recently in *Lujan v.*

National Wildlife Federation, 497 U.S. ___, 111 L.Ed.2d 695 (1990) and *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 775 (1990).

The Oregon Lands Coalition (OLC) is a non-profit organization founded on August 31, 1989, by eleven community-based, grassroots, timber organizations. The OLC now unites 51 member groups, representing nearly 75,000 families committed to "the need for balance of resource production and resource protection."

The Washington Lands Coalition (WLC) is a non-profit, grassroots organization dedicated to the principles of balance in the use and conservation of natural resources. WLC currently represents 27 groups with a total membership of over 17,000, made up primarily of independent loggers.

The Oregon Lands Coalition and the Washington Lands Coalition represent the views of hundreds of thousands of men and women of the Pacific Northwest, men and women whose lives will be devastated further should the decision below be upheld. While the present parties represent important economic, environmental and constitutional views, none can speak to the critical social issues brought forward by the Oregon Lands Coalition and the Washington Lands Coalition through their counsel, Mountain States Legal Foundation. These views will further aid this Honorable Court in deciding the instant matter.

For the foregoing reasons, Mountain States Legal Foundation, the Oregon Lands Coalition and the Washington Lands Coalition request that this motion to file the annexed brief of *amici curiae* be granted.

DATED: August 23, 1991.

Respectfully submitted,

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IDENTITIES AND INTERESTS OF AMICI

The identities and interests of *amici curiae* are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Seattle Audubon Society v. Robertson*, (*Robertson*) 914 F.2d 1311 (9th Cir. 1990).

INTRODUCTION

Since the adoption of the Endangered Species Act in 1973, no solitary issue has so focused the attention of the nation on the single-mindedness of that statute and its often Draconian results – "whatever the cost," *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) – as has the controversy in the Pacific Northwest over the Northern Spotted Owl.

For it is there that the allegedly threatened status of the Northern Spotted Owl and the concomitant federal protection plan may well result in the loss of as many as 97,590 jobs in Washington, Oregon and California.[1] Approximately half of that loss will be direct timber jobs and the remainder will be in occupations dependent upon the timber industry.

These devastating figures are rendered even more disastrous by the realization that they will not be spread evenly throughout the tri-state area, or even occur primarily in the larger metropolitan areas. Instead, the impact will be imposed upon small communities where timber harvesting – particularly on the federal lands

[1] Lippke, B., "Three-State Impact of Spotted Owl Conservation and Other Timber Harvest Reductions," September 1990, p. 27.

which predominate in many rural counties – is the major economic activity. For those communities, job losses on such a scale will mean the death of entire towns.[2]

With those communities will go not just unique elements of Americana which all Americans revere, but jobs; federal, state and local taxes; millions of dollars from the sale of federal timber resources – twenty-five percent of which is returned to local communities for education;[3] millions of dollars from the sale of private and state-owned timber;[4] and much needed weight on the positive side of the nation's balance of trade.[5]

---

[2] The National Association of Counties (NACo), which represents the elected officials of the nation's 3,000 counties, last year declared Mill City, Oregon, an endangered community due to the Northern Spotted Owl controversy.

Lippke reports that "most of this decline will occur in rural communities[,]" and that "[t]he market value of home assets in timber-dependent communities could decline by as much as $3.5 billion, based on the midrange estimate of harvest reductions." *supra*, p. 2. Obviously, larger cut backs will be even more devastating. This reduction in property values will not only reduce the mobility of unemployed workers, but will further reduce revenues from property taxes.

[3] "Federal forest payments and severance taxes which provide receipts for local governments . . . . may be reduced by more than $100 million." Lippke, B., *supra*, p. 2.

[4] U.S. Fish and Wildlife Service officials have testified that implementation of the Endangered Species Act, as it applies to the Northern Spotted Owl, will prevent the harvesting of private and state-owned timber resources. As much as a billion board feet of such timber, worth $350 million, will be placed off limits with a resultant loss of 17,000 jobs. Lippke, B. *supra*, p. 26.

[5] "Since the product demand is not reduced but merely shifted to other suppliers, this capacity would, over time, be

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While losing such benefits, the Pacific Northwest and the nation will be burdened further with increased unemployment compensation; greater dependence upon foreign sources for wood products; ever escalating costs for timber products -- putting the dream of home ownership out of the reach of hundreds of thousands of Americans;[6] compensation paid to private landowners for unconstitutional "takings;"[7] and the incalculable costs of increased rates of divorce, suicide and spousal and child abuse.[8]

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replaced by foreign suppliers at a cost of $4.3 billion." Lippke, B., *supra*, p. 3.

[6] The National Home Builders Association reported that a 20% increase in the price of wood products puts home ownership out of the reach of 65,000 American families. According to *Random Lengths*, a publication which tracks timber prices, framing lumber prices increased more than 50% in the four months following February 1, 1991.

[7] The natural and proper result of the decisions of this Honorable Court in *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), give a frightening glimmer of the future costs to the nation of "takings" under the Endangered Species Act: *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) ($2.658 million for taking 12.5 acres); *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989) ($60.296 million, plus prejudgment interest from August 3, 1977, for taking 1,327 acres).

[8] Lee, G., Ph.D., Professor of Forest Resources, University of Washington, Testimony Prepared for a Hearing of the Committee on Commerce and Labor of the Washington State House of Representatives, submitted on June 14, 1990. Dr. Lee attributes the massive emotional blow to timber workers, timber families and timber communities to four factors: (1) job loss; (2) loss of trust in government-assured wood supplies; (3)

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It was in the context of this looming regional disaster, and national tragedy, that the United States Congress

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conflict of entrepreneurial and collective values; and (4) dehumanization through the public degrading of timber occupations.

See, also, Lippke, B., *supra*, p. 3.

United States Senator Slade Gorton put it this way:

> Let us now look at some of the brutal human consequences of spotted owl protection now becoming apparent. Real working people are suffering. They are living and even dying in pain and grief. I do not exaggerate. The *Seattle Post-Intelligencer* reported yesterday from Forks, the very same small town that is now part of spotted owl "critical habitat."
>
> Here are the cold facts. The number of victims of domestic violence in Forks has jumped 45% this year. The community's mental health center has seen an increase of 22% in its case load. The number of juveniles charged with assault in Clallam County has increased 148%. Welfare grants for single-parent households in Forks increased 137% and food stamp grants increased 27%, *in just one month*. The children at Forks Elementary School are in extreme danger. Last month, two children made serious attempts at suicide. The counselor at that school says her children are "just burnt out and crying for no reason. They don't know if they are staying or going. They don't know if they are leaving home, leaving their roots. All the kids are talking about it, and they are scared. The anger – it is incredible. We have had kids in the office who have never been there before. Kids hurting other kids, breaking things, cursing."

137 Cong. Rec. §8630 (daily ed. June 25, 1991.) (Emphasis in original.)

stepped in and adopted, in the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub.-L. No. 101-121, Tit. III. §318(b)(6)(A), 103 Stat. 747 (1989), the so-called Northwest Timber Compromise (Compromise).[9] Now that Compromise is being challenged as contrary to the Constitution.

Respondents and their ilk, whose mantra – since the adoption of the Endangered Species Act and its command to "use . . . all methods and procedures which are necessary" to preserve endangered species – has been "will of Congress," "will of Congress," "will of Congress," now ask this Honorable Court to brush aside the clearly stated will of Congress, and to substitute instead the views of a three member panel of the Ninth Circuit Court of Appeals.[10]

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[9] The recognition of the national importance of the growing crisis in the Pacific Northwest is revealed by the fact that the Compromise was adopted notwithstanding the fact that only four of one hundred Senators and thirteen of four hundred thirty-five Members of Congress are from Washington and Oregon.

[10] In so doing, Respondents seek to enjoy the benefits of those aspects of the Compromise which they favor, while ridding themselves of the burdens which were the *quid pro quo* for the Compromise adopted by Congress. As a matter of equity and good public policy, such conduct is impermissible:

> Parties are not only bound to act fairly in their dealings with each other, but they are not to expect the aid of a court of equity to enforce an agreement made with the intent that it shall operate inequitably or as a fraud on the private rights and interests of third persons or on the public generally. Thus, the

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The Compromise adopted by Congress was simple and straight forward. Its objective could not have been more clear: to ensure a proper balance between preserving the economic viability of the Pacific Northwest and protecting the Northern Spotted Owl. An essential component of that Compromise was Section 318 – the provision at issue herein – in which Congress adopted specific and legal exemptions to various environmental and public lands statutes.

Congress, as a matter of legislative shorthand – while still expressing its very clear intent – chose not to refer to the multitude of statutory challenges lodged by Respondents, but instead referred to the cases themselves.[11] Despite such clearly permissible legislative shorthand, what the Congress did remains clear, it changed federal law.

Unfortunately, to this clear and legitimate expression of Congressional intent, a panel of the Ninth Circuit Court of Appeals turned a blind eye. The panel not only substituted its own view of what should be taking place in the Pacific Northwest for the public policy set forth by Congress, but in so doing committed numerous errors which require reversal by this Honorable Court.

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requirements of public policy will be considered in determining the applicability of the maxim.

27 Am Jur 2d Equity §136, p. 668.

[11] The complaints and amended complaints filed in the matter below comprise 81 pages. It is little wonder that Congress chose not to address each of the allegations of Respondents.

The panel violated the most rudimentary principle of statutory construction, that is, if possible, an act of Congress must be read so as to preserve its constitutionality. Furthermore, the panel wavered in its adherence to the Constitution, when, by its decision, it robbed the Congress of its authority over the management of the public lands.

Mountain States Legal Foundation, the Oregon Lands Coalition and the Washington Lands Coalition submit that the action of Congress, in adopting the Compromise, was constitutional and that the decision below should be reversed.

ARGUMENT

I. THE PANEL OF THE NINTH CIRCUIT COURT OF APPEALS COMMITTED ERROR BY FAILING TO INTERPRET SECTION 318 SO AS TO UPHOLD ITS CONSTITUTIONALITY.

The most fundamental and basic tenet of constitutional law is that:

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court *will construe* the statute to avoid such problems unless such construction is *plainly contrary* to the intent of Congress.

DeBartolo v. Fla. Gulf Coast Tr. Coun., 485 U.S. 568, 575, (1988). (Emphasis added.) Likewise,

> It is of course true that federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with

> such doubts the Court will first determine whether it is fairly *possible* to interpret the statute in a manner that renders it constitutionally valid.

Communications Workers v. Beck, 487 U.S. 735, 762 (1988). (Emphasis added.)

Incredibly, the panel below, while citing *Beck*, declined to uphold the constitutionality of Section 318 because it could not do so "fairly." *Robertson*, at 1317. Thus, the panel disingenuously ignored the operative word in *Beck* which is not "fairly" but "possible." In so doing, the panel ignored the clear intent of Congress to change, for the purposes of the timber harvest directed during fiscal year 1990, applicable environmental and public lands statutes.

The panel's reliance upon the decision of this Honorable Court in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), could not be more misplaced. In *TVA*, the respondent argued, unsuccessfully, that the appropriations statute, by implication, expressed the intent of Congress to complete the Tellico Project notwithstanding the Endangered Species Act. Unlike *TVA*, Congressional intent in the instant case could not be more clear. Congress intended that certain timber harvesting goals were to be met notwithstanding the numerous and varied environmental and public lands statutes listed in Respondents' lawsuits.

It is not merely "possible" to interpret Section 318 of the Compromise as constitutional, but, as the panel has demonstrated by its awkward and myopic reading of the case law, almost impossible not to.

II. THE PANEL OF THE NINTH CIRCUIT COURT OF APPEALS COMMITTED ERROR BY USURPING THE CONSTITUTIONAL POWER OF CONGRESS TO MANAGE THE PUBLIC LANDS.

While espousing a faithful adherence to the commands of the Constitution, the panel below failed to give full meaning to the Property Clause. As this Honorable Court has held:

> The power over the public lands thus intrusted to Congress is without limitation. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." *Light v. United States*, 220 U.S. 523, 537 (1911) Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its view of public policy.

United States v. San Francisco, 310 U.S. 16, 29-30 (1940).

More recently, this Honorable Court held:

> And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitation."

Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). *California Coastal Commission v. Granite Rock*, 480 U.S. 572, 580 (1987).

Were this Honorable Court to permit the decision below to stand, it would be the first ever limitation on the power of Congress over public land. This is a backward step which the Constitution does not permit.

III. THE PANEL OF THE NINTH CIRCUIT COURT OF APPEALS COMMITTED ERROR BY ITS MISAPPLICATION OF THE DECISION OF THIS HONORABLE COURT IN *KLEIN v. UNITED STATES* AND ITS FAILURE TO APPLY *PENNSYLVANIA v. THE WHEELING AND BELMONT BRIDGE CO.*

In another twisted bit of logic, the panel below ignored the case most directly applicable to the Compromise adopted by Congress, *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), and instead embraced *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). While acknowledging that *Wheeling* holds that "Congress can amend or repeal any law, even for the purposes of ending pending litigation," *Robertson*, at 1315, the panel concluded that Congress had not sought to amend or repeal existing law. Once again, it appears the panel's holding was founded on Congress' use of legislative shorthand rather than some magic phrase to the liking of the panel.

By relying on *Klein*, the panel also ignored the Ninth Circuit's own holding in *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987), in which the court adhered to a two-prong test. The panel is flatly in error when it concluded that *Grimesy v. Huff*, 876 F.2d 738 (9th Cir. 1989) abandoned either element of that test.

The holding of this Honorable Court in *Klein* is a most slender reed upon which to support a decision declaring an act of Congress unconstitutional. This is particularly the case when that slender reed is balanced precariously atop an even more slender reed, that is, the

view of the panel below that the intent of Congress cannot be discerned because Congress did not use the words "repeal" or "amend."

IV. THE PANEL OF THE NINTH CIRCUIT COURT OF APPEALS COMMITTED ERROR BY ITS FAILURE TO APPLY ITS EARLIER RULING IN *STOP H-3 ASSOCIATION v. DOLE*.

The distinction the panel below drew between its earlier decision in *Stop H-3 Association v. Dole*, 870 F.2d 1419 (9th Cir. 1989) and the instant decision strains credulity. In *Stop H-3*, an appropriations bill directed the Secretary of Transportation to build a highway – the subject of on-going litigation – notwithstanding various environmental statutes. Contrary to the language used by the panel below, Congress did not specifically "withdr[a]w" the "statutory environmental protection provisions underlying the ongoing litigation as to the challenged project." *Robertson* at 1316. In fact, what Congress did in *Stop H-3*, was exactly what it did in adopting the Compromise at issue here.

In *Stop H-3*, the Congress directed the Secretary of Transportation to approve construction of the highway, "notwithstanding" certain named environmental statutes. In the Compromise at issue here, Congress directed the federal agencies involved to harvest timber notwithstanding the statutes challenged by Respondents in their lawsuits. It is of little moment that Congress, in adopting

Section 318, referenced the statutes in question, not by name, but by their presence in litigation.[12]

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[12] Had Congress enumerated the statutes to be "amended" or "repealed" by Section 318, it is altogether likely that, in light of the 81 pages of complaints and amended complaints filed by Respondents, Congress would have overlooked some minor, alleged statutory violation. One has little doubt, given Respondents' proclivities, that a lawsuit would have ensued in which Respondents would have sought to frustrate the will of Congress.

A case in point is the attempt of Congress to ensure the construction of a $240 million observatory atop Mount Graham in south eastern Arizona. In order to ensure the construction of the first three telescopes in the project, Congress adopted the Idaho-Arizona Conservation Act, in which it concluded that the requirements of the Endangered Species Act had been met. The intent of Congress could not have been more clear. As U.S. Senator John McCain stated:

> If the Senate and House approve this amendment and the President signs the bill, we will be taking a new step into discovering more about ourselves, our world, and its beginnings. Three telescopes *will be built immediately. They can no longer be stalled by process, by litigation, or by whim.*

134 Cong. Rec. S15741 (daily ed. Oct. 13, 1988) (Emphasis added). Senator McCain was wrong. The project has been stopped by litigation filed by several environmental organizations, *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991).

CONCLUSION

The tragedy now ongoing in the Pacific Northwest is one of epic proportions. Its proper and equitable resolution will take months, if not years. However, with the adoption of the Northwest Timber Compromise, Congress began the process of balancing the needs of the American people for a strong, vibrant economy and a healthy environment.

The effort of Congress to achieve that golden mean must not be frustrated by the narrow self interest set forth by Respondents or by the purblind approach to Congressional action adopted by the Ninth Circuit Court of Appeals.

For the above reasons, Section 318 of the Northwest Timber Compromise should be upheld and the decision below reversed.

DATED: August, 1991.

Respectfully submitted,

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